



A P P E A R A N C E S:

FOR THE GOVERNMENT: NOVALINE WILSON  
novaline.wilson@usdoj.gov  
KYLE NAYBACK  
Office of the U.S. Attorney  
201 Third Street, Northwest #900  
Albuquerque, New Mexico 87103  
505-346-7274

FOR DEFENDANT: ARIC ELSENHEIMER  
aric\_elsenheimer@fd.org  
Office of the Federal Public  
Defender  
111 Lomas Boulevard, Northwest,  
#501  
Albuquerque, New Mexico 87102  
505-346-2489

1 THE COURT: If everyone's ready, then we'll  
2 go on the record.

3 We are on the record in USA versus Smith.  
4 The case number is CR-18-3495.

5 And can I have counsels' appearances,  
6 please?

7 MS. WILSON: Good morning, Your Honor.  
8 Novaline Wilson and Kyle Nayback on behalf of the  
9 United States.

10 THE COURT: Good morning.

11 MR. ELSENHEIMER: Good morning, Your Honor.  
12 Aric Elsenheimer on behalf of Mr. Doug Smith.  
13 Mr. Smith is at his residence in Espanola. My  
14 colleague, Dan Berg is there with him so that  
15 Mr. Smith can appear by Zoom.

16 Mr. Smith has no problem appearing by Zoom,  
17 but I will get a signed waiver of personal presence  
18 as soon as I can, but I have to get a copy of that.

19 THE COURT: All right. Well, I'll go ahead  
20 and do as I do in all of these Zoom hearings, and  
21 just verify with the defendant that he agrees to  
22 participate in this hearing today by way of Zoom  
23 video conference.

24 So if Mr. Berg could unmute the microphone  
25 for just a moment.

1           So I'm -- this -- by my estimation, this is  
2 essentially a legal argument today. Nevertheless,  
3 let me ask Mr. Smith -- well, we -- I just want to  
4 put on the record that all of us are participating  
5 today by way of video conference, and most of us are  
6 not in the same place. You're at your home in  
7 Espanola, I'm at the courthouse in Santa Fe, and  
8 counsel are in different places, I assume in  
9 Albuquerque.

10           So I just want to make sure that,  
11 Mr. Smith, you understand that we're all  
12 participating by way of video conference. And I want  
13 to know whether or not you are in agreement with  
14 proceeding today by way of video conference.

15           THE DEFENDANT: I am in agreement.

16           THE COURT: All right.

17           THE DEFENDANT: I understand.

18           THE COURT: All right. Thank you,  
19 Mr. Smith.

20           And your attorney indicated that he would  
21 be getting a waiver of your personal appearance for  
22 the record after this hearing. But I just wanted to  
23 make sure that you -- you were okay with it.

24           So all right.

25           Well, we're here today to take up

1 defendant's motion to dismiss for lack of federal  
2 jurisdiction.

3           Everybody ready to proceed?

4           MR. ELSENHEIMER: Yes, Your Honor.

5           MS. WILSON: Yes, Your Honor.

6           THE COURT: All right. I don't know -- let  
7 me ask: Does anybody intend to put on any evidence  
8 today, any witnesses?

9           MS. WILSON: The United States does,  
10 Your Honor. We did file a motion in limine for  
11 pretrial determination of Indian Country. And these  
12 would be the same witnesses from the Santa Clara  
13 realty office who would testify.

14           We have a GIS technician Ivan Shije, and  
15 also the realty director, Jesse Gutierrez. So those  
16 are the two witnesses we are prepared to put on.

17           THE COURT: All right. Let me ask  
18 Mr. Elsenheimer.

19           Do you intend to put on any testimony  
20 today?

21           MR. ELSENHEIMER: No, I don't, Your Honor.

22           THE COURT: Okay. I have reviewed the  
23 pleadings that you all filed, so I don't require any  
24 oral argument.

25           If you all would -- if you have some brief

1 opening comments that you feel you need to make I'll  
2 accommodate you. But otherwise, I'm ready to hear  
3 the testimony.

4 Ms. Wilson, anything?

5 MS. WILSON: No, Your Honor. The  
6 United States is prepared to call our first witness.

7 THE COURT: All right.

8 Mr. Elsenheimer, any preliminary comments?

9 MR. ELSENHEIMER: No, Your Honor. If I  
10 could just have an opportunity at the end to make a  
11 brief statement.

12 THE COURT: Yes. If -- if anybody has  
13 anything they want to say, I will certainly  
14 accommodate you. I'm just -- I just wanted you to be  
15 assured that I've read your briefs and I'm ready to  
16 hear some testimony.

17 With that, then, Ms. Wilson, you may call  
18 your first witness.

19 MS. WILSON: The United States calls Ivan  
20 Shije.

21 THE COURT: All right.

22 So, Mr. Shije, can you hear everything all  
23 right?

24 THE WITNESS: Yes, I do, Your Honor.

25 THE COURT: Okay. Good.

1           Since we're not in the same room, I'm going  
2 to have my law clerk administer the oath to you by  
3 way of this video conference.

4           So, Virginia, can you administer the oath,  
5 please?

6           (Whereupon the witness was sworn.)

7           THE COURT: So, Mr. Shiye, what I'm going  
8 to do is, I'm going to ask you to spell your first  
9 and last names for the record, please.

10          THE WITNESS: Okay. My first name is Ivan,  
11 I-V-A-N. My last name is Shiye. It's spelled  
12 S-H-I-J-E.

13          THE COURT: Okay. Thank you, Mr. Shiye.  
14 Ms. Wilson, you may proceed.

15          MS. WILSON: Thank you.

16          IVAN SHIJE, GOVERNMENT'S WITNESS, SWORN

17                           DIRECT EXAMINATION

18          BY MS. WILSON:

19          Q. Mr. Shiye, what is your occupation, sir?

20          A. I am a GIS technician for the Santa Clara  
21 Pueblo realty department.

22          Q. Okay. And could you tell the Court what GIS  
23 stands for?

24          A. Geographical information system.

25          Q. And in order to be a GIS technician, did you

1 have any specialized education or training?

2 A. Yes.

3 Q. And where did that take place?

4 A. At SIPI, which is the Southwestern Indian  
5 Polytechnic Institute.

6 Q. Are you certified?

7 A. Yes.

8 Q. And is that certification specific to your  
9 current position as a GIS technician?

10 A. Yes.

11 Q. And who is your employer?

12 A. Santa Clara Pueblo.

13 Q. And is the Pueblo of Santa Clara a  
14 federally-recognized Indian tribe?

15 A. Yes, ma'am.

16 MS. WILSON: Your Honor, we would ask the  
17 Court to take judicial notice that Santa Clara Pueblo  
18 is a federally-recognized Indian tribe.

19 THE COURT: Is there objection,  
20 Mr. Elsenheimer?

21 MR. ELSENHEIMER: No, Your Honor.

22 THE COURT: All right. The Court will take  
23 judicial notice.

24 BY MS. WILSON:

25 Q. And, Mr. Shije, could you tell the Court: What



1 are your responsibilities in your job position?

2 A. I create maps. We do a lot of the land  
3 transfer inter boundary issues, coordinates,  
4 et cetera, et cetera.

5 Q. And as part of the duties, you make maps to  
6 help determine the boundaries of the Pueblo of  
7 Santa Clara?

8 A. Yes, ma'am.

9 Q. And in some cases is that used to determine  
10 jurisdiction?

11 A. Yes, ma'am.

12 Q. And what type of technology do you use?

13 A. We use the GIS software. It is called Art Map.

14 Q. And could you explain to us a little bit what  
15 that is, what that involves, what data it draws from?

16 A. Yeah. It's just -- basically we have about six  
17 different kinds of imageries. We mostly use a lot of  
18 the satellite imagery.

19 We create shape files which are shared. We  
20 share shape files with Rio Arriba, Santa Fe County,  
21 and also with the BIA.

22 And what those shape files are, are  
23 basically polygons which you can add on to -- to  
24 create a map onto the imagery.

25 Q. Okay. As part of your duties, were you asked

1 to determine whether a location, specifically  
2 826 North Riverside Drive, was within the boundaries  
3 of the Santa Clara Pueblo?

4 A. Yes.

5 Q. And could you describe for us how you did that?

6 A. We went out onto the field with my GPS, which  
7 is a global positioning system. It's a device, and  
8 you go on -- you go to the location. You take about  
9 30 -- I'd say 30 points -- and that shows you where  
10 your coordinate is.

11 And you go ahead and you bring that data  
12 back to the office and you create a map with it. And  
13 it shows you where that location is that you took.

14 Q. And approximately how many maps did you create  
15 for this case?

16 A. I believe two maps.

17 Q. Okay. If I could show you what has been marked  
18 for identification purposes as Government's  
19 Exhibits 2 and 3.

20 I will start with 2 first.

21 A. Okay.

22 Q. Do you see that, Mr. Shije?

23 A. Yes, I do.

24 Q. Okay. This has been marked. Let me start with  
25 the first one, as Government's Exhibit 2.

1 Do you recognize this?

2 A. Yes, I do.

3 Q. And how so?

4 A. I created the map.

5 Q. And let me show you what's been marked as  
6 Government's Exhibit 3.

7 So there's two maps here.

8 Government's Exhibit 3.

9 Do you recognize this also?

10 A. Yes, ma'am.

11 Q. How so?

12 A. I created that one also.

13 MS. WILSON: At this time, Your Honor, the  
14 United States would move for admission of Exhibits 2  
15 and 3 and permission to publish.

16 THE COURT: Is there objection for the  
17 admission of Exhibits 2 and 3 or 3, Mr. Elsenheimer?

18 MR. ELSENHEIMER: No, Your Honor.

19 THE COURT: All right. Exhibits 2 and 3  
20 are admitted.

21 BY MS. WILSON:

22 Q. Okay. Let's go ahead, Mr. Shije, and talk  
23 about Government's Exhibit 2, the first map that you  
24 created.

25 Could you describe this for the Court?

1 A. Yes. The -- the polygons, which are in red,  
2 that's a close-up image of the Western Winds Motel.

3 And as you can see, there are all the  
4 various businesses around that location and the main  
5 street that runs on the side of the Western Winds  
6 Motel.

7 Q. And if you could, describe for the Court what  
8 the map you created in the bottom of Government's  
9 Exhibit 2 depicts.

10 A. Okay. So what that is there is the boundary of  
11 Santa Clara Pueblo, which is in lime green. And that  
12 little red dot there is explaining where the Western  
13 Winds Motel is located within the exterior boundaries  
14 of Santa Clara Pueblo.

15 Q. And were you able to determine how far that  
16 Western Winds Motel, located at 826 North Riverside  
17 Road, was from the boundary?

18 A. Yes. It is a quarter mile south of the  
19 northern boundary of the Santa Clara Pueblo land  
20 grant.

21 Q. Let me show you, Mr. Shije. If you could,  
22 describe for the Court what you did in the top part  
23 of Government's Exhibit 3.

24 A. Okay. So what I did here is, we have a -- we  
25 have a drawer full of plats, of private claims, that

1 all are within the exterior boundary of the  
2 Santa Clara Pueblo land grant.

3 And as you can see here, I -- I scanned the  
4 plat and I overlaid it onto some satellite imagery.

5 And I don't know if you can see. If you  
6 zoom up a little bit closer, you can see where it  
7 says the north boundary of the Santa Clara Pueblo  
8 land grant.

9 So what I did there is I kind of positioned  
10 it to where -- you know, where it fits where all the  
11 parcels are.

12 And then the star there is the location of  
13 the western boundary -- I mean the Western Winds  
14 Motel, excuse me -- with the streets.

15 And also the red line there kind of  
16 explains where the northern boundary of Santa Clara  
17 Pueblo is located.

18 Q. Okay. And just for the record, did I -- did I  
19 highlight that properly, that northern boundary? Is  
20 that properly designated, just for the record?

21 A. Yes, ma'am.

22 Q. Okay. And finally, sir, if you could explain  
23 to the Court what you did in the bottom half of  
24 Government's Exhibit 3.

25 A. Okay. For the bottom half, that's just like a

1 medium zoom image of the Santa Clara Pueblo land  
2 grant boundary.

3 The star there shows where the Western  
4 Winds Motel is also located within the exterior  
5 boundaries of Santa Clara Pueblo.

6 The little grids on the map are the  
7 section, township, and range, which I believe is 35,  
8 21 north, 8 east.

9 And if you -- if you scroll up to the big  
10 map there with the plat, it -- it shows that section,  
11 township, and range also.

12 Q. And that would be right here (indicating)?

13 A. Yes, ma'am.

14 Q. Okay. Thank you.

15 And, Mr. Shije, in this case were you  
16 responsible for making the certified determination  
17 that that is Indian Country?

18 A. No.

19 Q. Who did that?

20 A. Well, my supervisor.

21 Q. And what is his name?

22 A. Jesse Gutierrez.

23 MS. WILSON: I pass the witness,  
24 Your Honor.

25 MR. ELSENHEIMER: Your Honor, would it be

1 possible to ask to have the exhibits left on the  
2 screen? I have a couple of questions about them.

3 THE COURT: Can you leave them on,  
4 Ms. Wilson?

5 MS. WILSON: Yes.

6 MR. ELSENHEIMER: If it's possible, just  
7 because I don't have control over that, if it's  
8 possible to go to Exhibit 1. I have a question about  
9 Exhibit 1.

10 MS. WILSON: Exhibit 2?

11 MR. ELSENHEIMER: I'm sorry. Yeah.  
12 Exhibit 2. I'm sorry, Ms. Wilson.

13 CROSS-EXAMINATION

14 BY MR. ELSENHEIMER:

15 Q. Good morning, Mr. Shije.

16 A. Good morning.

17 Q. Am I pronouncing your name correctly?

18 A. That's correct.

19 Q. Great.

20 I have a few brief questions for you.

21 First of all, if you're looking at  
22 Government's Exhibit 2, there is a neon green line.

23 Can you tell me what that line represents?

24 A. Yes. That's the Santa Clara Pueblo land grant  
25 boundary.

1 Q. Is that the original historical land grant  
2 boundary?

3 A. It has expanded over the years, but that is the  
4 original.

5 Q. And how -- where did this line come from? In a  
6 sense, you created this particular image, correct?

7 A. No. This was created before I arrived at my  
8 job.

9 Q. And so you didn't put the neon green line on  
10 this particular map?

11 A. Oh, I -- I put the green -- the neon green  
12 boundary onto this imagery. It's just that the  
13 street file was created before I got here, and it was  
14 passed on to me.

15 Q. I see. But you did put the green boundary on  
16 this?

17 A. Yes, I did.

18 Q. Okay. And where do you get the data to put  
19 this -- to ascertain exactly where that green line  
20 should go?

21 A. This data was created before I got here, so  
22 it's been passed down. We have them -- I have them  
23 in my external hard drive. And you go ahead and you  
24 transfer it onto an imagery.

25 And I believe that BIA also uses this



1     imagery as well.

2     Q.     Is it GPS data?

3     A.     It's GIS data.

4     Q.     GIS data.   Okay.

5     A.     Yes, sir.

6     Q.     There's a white dotted line to the right of the  
7     image.

8     A.     Uh-huh.

9     Q.     And the red dot is on that white dotted line.

10            What does that white dotted line signify?

11     A.     It explains where -- the split between Santa Fe  
12     and Rio Arriba County.

13     Q.     So it's a county line?

14     A.     Yes, sir.

15     Q.     Okay.

16            MR. ELSENHEIMER:   Can we -- Ms. Wilson,  
17     could we scroll to the next image?   I believe it's  
18     Exhibit 3.

19            Precisely.   Right there is fine.   Thank  
20     you.

21     BY MR. ELSENHEIMER:

22     Q.     Mr. Shije, let me ask you about this image.

23            My understanding is that you took -- there  
24     was an overlay there.   There is a plat or a map  
25     describing private holdings?

1 A. Yes, sir.

2 Q. And you placed another map over that?

3 A. Yes. I -- I placed the overlay of the plat  
4 over the imagery that is provided through Art Map,  
5 which is the software I use.

6 Q. Okay. So let me make sure that I understand  
7 this.

8 So originally, this had kind of an imagery  
9 where you see some buildings and trees and -- and  
10 roads.

11 Is that correct?

12 A. Yes, sir.

13 Q. And then you took a plat map which has, let's  
14 say for example, right in the center it says Alfred  
15 Lucero and his wife, and P.H. Hill.

16 You took that, which is the plats, and you  
17 overlaid it on top of the imagery that contains kind  
18 of photographs of trees and buildings.

19 Is that right?

20 A. Yes, sir.

21 Q. Okay. You said this describes certain private  
22 claims.

23 Is that correct?

24 A. Yes, sir.

25 Q. So all of these -- is it true that all of these

1 particular holdings that are described by the plat  
2 map are private claims?

3 Is that right?

4 A. Yes, sir.

5 Q. So let's say, for example, that we look at  
6 where the star is on this particular image, and it  
7 overlays the property that you were asked to look  
8 into.

9 That's a private claim, correct?

10 A. Yes. A private claim within the stated  
11 boundary of Santa Clara Pueblo.

12 Q. And the claims that are north of that, so going  
13 toward the boundary, are those all private claims?

14 A. Yes, they are.

15 Q. Is everything on here a private claim?

16 A. Yes.

17 Q. So this is all private claims. And like you  
18 say, within the exterior boundaries, but they're all  
19 private claims, correct?

20 A. Yes, sir.

21 Q. And they have been since -- well, do you know  
22 how long they've been private claims?

23 A. Well, this -- this plat was filed with the  
24 public survey office in Santa Fe in 1936.

25 Q. Okay. So these would have at least been

1 private claims since 1936.

2 Is that right?

3 A. Yes.

4 Q. Okay. And the property -- again, just to make  
5 sure that we -- the property that you were asked to  
6 look into, the property that is at issue in this  
7 case, is -- is depicted with the star, the gold star  
8 over it, right?

9 A. Yes, sir.

10 Q. And that's a private claim?

11 A. Yes.

12 Q. Since 1936?

13 A. Yes.

14 Q. Thank you, sir.

15 A. Uh-huh.

16 MR. ELSENHEIMER: I have no further  
17 questions, Your Honor.

18 THE COURT: All right. Thank you.

19 Ms. Wilson, anything further?

20 MS. WILSON: No, Your Honor. We pass the  
21 witness.

22 THE COURT: May this witness be excused?

23 MS. WILSON: Yes, Your Honor. Thank you.

24 MR. ELSENHEIMER: Yes, Your Honor.

25 THE COURT: All right. Thank you for your

1 testimony today, Mr Shije.

2 Ms. Wilson, you may call your next witness.

3 MR. NAYBACK: Good morning, Your Honor.

4 Kyle Nayback, and I'll call Jesse Gutierrez  
5 to the stand.

6 (Discussion off the record.)

7 THE COURT: Good morning, Mr. Gutierrez.

8 THE WITNESS: Good morning.

9 THE COURT: So I take it you can hear me  
10 all right?

11 THE WITNESS: Yes.

12 THE COURT: Okay. Good.

13 So before we begin, I am going to ask my  
14 clerk to swear you in.

15 All right, Virginia?

16 (Whereupon the witness was sworn.)

17 THE COURT: All right. Mr. Gutierrez, what  
18 I'm going to ask you to do before we begin is simple.  
19 If you would, please, for the record, could you  
20 please spell your first and last names?

21 THE WITNESS: Sure. My name is Jesse  
22 Gutierrez. J-E-S-S-E. G-U-T-I-E-R-R-E-Z.

23 THE COURT: All right. Thank you.

24 So with that, then, Mr. Nayback, you may  
25 proceed.

1 MR. NAYBACK: Thank you, Your Honor.

2 JESSE GUTIERREZ, GOVERNMENT'S WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MR. NAYBACK:

5 Q. Mr. Gutierrez, would you tell us where you are  
6 employed?

7 A. Santa Clara Pueblo.

8 Q. What is your title?

9 A. A realty director.

10 Q. Do you know an Ivan Shiye?

11 A. Yes.

12 Q. Do you supervise him?

13 A. Yes.

14 Q. Can you describe the training that you received  
15 to perform your job, as you just described your  
16 title?

17 A. Yes. I received some GIS, GPS training.

18 Q. Where was that at?

19 A. At SIPI, Southwestern Indian Polytechnic  
20 Institute, and also from BIA logs, which is a --

21 Q. And you had --

22 A. -- geographic support.

23 Q. And, Mr. Gutierrez, do you try to keep -- well,  
24 let me ask you this.

25 Are you certified in GIS?

1 A. Yes.

2 Q. And do you try to keep up to date on the latest  
3 technology?

4 A. Yes, I do.

5 Q. Okay. Can you please describe for the Court  
6 what you do in your position?

7 A. I oversee the lands at Santa Clara Pueblo, and  
8 also deal with trespass issues, internal land  
9 transfers, leases, and right of ways.

10 Q. Are you familiar with a case called  
11 United States versus Douglas Smith?

12 A. Now I am. At this time I am.

13 Q. How did you get involved in the case?

14 A. I was asked by Mr. Travis Taylor, from the FBI,  
15 to provide a land status.

16 Q. Okay. As part of his request, were you asked  
17 to determine whether the scene of an alleged crime is  
18 within the exterior boundaries of the Santa Clara  
19 Pueblo?

20 A. Yes.

21 Q. Can you describe for the Court the process that  
22 you use to determine whether a certain site is within  
23 the exterior boundaries of the Santa Clara Pueblo?

24 A. Once I got the request I went ahead and gave it  
25 to our GIS technician, Ivan Shiye.

1 Q. And can you describe what he produced?

2 A. Yes. He produced two maps. The first one was  
3 produced, and then the second one was an overlay of a  
4 plat of the -- over -- over our boundary and our  
5 imagery that we have, our shape file.

6 Q. After you reviewed those maps, did you have any  
7 conversations with Ivan Shiye about his work?

8 A. Yes, just to make sure that it's within our  
9 exterior boundaries, and make sure we've got the  
10 township -- section, township, and range correct.

11 Q. And were you confident that Ivan Shiye did his  
12 work accurately and correctly?

13 A. Yes.

14 Q. I am going to show you an exhibit,  
15 Mr. Gutierrez, if you could be patient.

16 A. Yes.

17 Q. Mr. Shiye [sic], do you recognize this letter  
18 dated July 27 of 2020?

19 A. Yes.

20 Q. Who drafted it?

21 A. I drafted the letter for our governor's  
22 signature.

23 Q. Is this -- Government's Exhibit 4, this letter  
24 that's in front of you, is it a fair and accurate  
25 depiction of the original letter that you drafted for



1 Governor Chavarria's signature?

2 A. Yes.

3 MR. NAYBACK: Your Honor, I move  
4 Government's Exhibit 4 and request to publish.

5 THE COURT: Any objection to Exhibit 4,  
6 Mr. Elsenheimer?

7 MR. ELSENHEIMER: No objection.

8 THE COURT: All right. Exhibit 4 is  
9 admitted.

10 BY MR. NAYBACK:

11 Q. Mr. Gutierrez, is this the letter that you  
12 produced to Travis Taylor of the FBI, in response to  
13 his inquiry to the realty office?

14 A. Yes.

15 Q. And can you describe the meaning of the letter?

16 A. Yes. It's just to provide a land status report  
17 on the area in which the incident occurred at  
18 826 North Riverside Drive, and just to show that it  
19 is within the exterior boundary of Santa Clara.

20 Q. What business is located at 826 North Riverside  
21 Drive, if you know?

22 A. The Western Winds Motel.

23 Q. Mr. Gutierrez, where is the nearest boundary of  
24 the Santa Clara Pueblo reservation to the Western  
25 Winds Motel?

1 A. That would be the northern boundary. It is  
2 about a quarter of a mile away.

3 Q. And did you see any errors or disputes of  
4 inquiry in Mr. Shije's work when you reviewed it?

5 A. No.

6 Q. What would you do if you saw any discrepancies?

7 A. I would make sure he corrected them.

8 Q. Mr. Gutierrez, is there any question in your  
9 mind that the Western Winds Motel, located at  
10 826 North Riverside Drive, is within the exterior  
11 boundaries of the Santa Clara Pueblo?

12 A. No, there's no question.

13 Q. Thank you.

14 MR. NAYBACK: I pass the witness,  
15 Your Honor.

16 THE COURT: Okay. Mr. Elsenheimer, you may  
17 cross-examine the witness.

18 MR. ELSENHEIMER: I have no questions,  
19 Your Honor.

20 THE COURT: All right.  
21 May this witness be excused?

22 MR. NAYBACK: He may, Your Honor.  
23 Thank you for your time.

24 THE WITNESS: Yes, sir.

25 MR. ELSENHEIMER: Yes, Your Honor.

1 THE COURT: All right. Thank you for your  
2 testimony today, Mr. Gutierrez.

3 THE WITNESS: Thank you.

4 Your Honor, a question?

5 THE COURT: Yes, sir.

6 THE WITNESS: Do I go ahead and log off, or  
7 do I stay on, or do we need anything else or...

8 THE COURT: Ms. Wilson, do you need  
9 anything further from the witnesses?

10 MS. WILSON: No, Your Honor. He can be  
11 excused.

12 THE COURT: All right.

13 Mr. Elsenheimer, you don't need anything  
14 from either of them.

15 Is that right?

16 MR. ELSENHEIMER: I do not.

17 THE COURT: Okay. Then yes, sir, you may  
18 log off.

19 THE WITNESS: Okay. Thank you.

20 You have a good day and be safe.

21 THE COURT: The same to you. Thank you.

22 THE WITNESS: Thank you.

23 THE COURT: Ms. Wilson, any other  
24 witnesses?

25 MS. WILSON: No, Your Honor.

1 THE COURT: And, Mr. Elsenheimer?

2 MR. ELSENHEIMER: We have no witnesses.

3 THE COURT: Okay. So with that, then, I  
4 will turn to counsel for any comment or argument  
5 you'd like to make.

6 MR. ELSENHEIMER: Who would you like to  
7 hear from first, Your Honor?

8 THE COURT: Honestly, it doesn't -- it  
9 doesn't matter to me.

10 If you all have a preference, go ahead.

11 MS. WILSON: I can start, Your Honor.

12 As -- as Your Honor heard from testimony  
13 today, the location is within the boundaries of the  
14 Santa Clara Pueblo. These boundaries have not been  
15 extinguished. Any such extinguishment has to be  
16 plain and unambiguous.

17 And from our perspective, the defendant  
18 misreads the 1924 PLA and the 2005 amendments.

19 The Tenth Circuit did hold, in Antonio,  
20 that the PLA did not terminate federal jurisdiction.  
21 And the Section 20A of the 2005 amendment includes  
22 language that specifically says within the exterior  
23 boundaries.

24 And that's consistent with the modern  
25 approach of how Indian Country is determined. And

1 that's consistent with the reading of the statute,  
2 Section 151, that Indian Country includes all the  
3 lands within the reservation.

4 Jurisdiction does not depend on Indian  
5 title. So the -- the fact that somebody -- private  
6 ownership within the boundaries does not affect  
7 Indian Country jurisdiction.

8 And recently, the Supreme Court held in  
9 *McGirt v. Oklahoma* -- and the United States did  
10 include this analysis in its Document 104 -- that  
11 once land is set aside, the boundaries are  
12 established for the use by the tribe. No matter what  
13 happens to the title of the parcels within the  
14 boundaries, that entire block remains Indian Country  
15 until Congress explicitly states otherwise, and that  
16 has not happened in this case.

17 Again, Congress has the power under the  
18 Indian commerce clause to regulate with regards to  
19 the tribe, and this is a basic tenet of federal  
20 Indian law.

21 And the United States submits that the  
22 property is clearly within the boundaries, a quarter  
23 mile from the northern boundary, and that his  
24 property is in Indian Country, and that this Court  
25 has jurisdiction over this case.

1           We would ask that defendant's motion to  
2       dismiss be denied and the Court grant the  
3       United States' motion for pretrial determination of  
4       Indian Country.

5           THE COURT: All right. Thank you,  
6       Ms. Wilson.

7           Mr. Elsenheimer?

8           MR. ELSENHEIMER: Your Honor, I think the  
9       fundamental disagreement in this cases is the effect  
10      of the Pueblo Lands Act, and then we get to the  
11      question of what happens in 2005.

12           But first, to address the consequences of  
13      the Pueblo Lands Act in 1924.

14           I want to refer the Court to the Supreme  
15      Court's recent decision in *McGirt v. Oklahoma*. This  
16      is a decision that came down, I believe, in June of  
17      this year. *McGirt* addressed the status of certain  
18      reservation land in eastern Oklahoma.

19           But there's an important facet of that  
20      decision that I think has bearing here.

21           In *McGirt*, the Supreme Court says once a  
22      reservation is established it cannot -- it retains  
23      that status unless Congress explicitly provides  
24      otherwise.

25           In this case, with the Pueblo Lands Act,

1 Congress explicitly provided otherwise.

2           With the Pueblo Lands Act, Congress said  
3 that the consequence of that is the relinquishment by  
4 the United States and the said Indians. So whatever  
5 pueblo was involved or had previously -- of -- of the  
6 land in question, it was a relinquishment by the  
7 United States and the said Indians, or the pueblo.

8           That is the type of language that McGirt  
9 would -- I believe under the language of McGirt --  
10 have to find as a diminishment or disestablishment of  
11 a particular tribe.

12           In this case we're talking about a  
13 diminishment. The pueblo was not disestablished, but  
14 it was diminished.

15           It was diminished because certain claims on  
16 that -- of that pueblo were -- became private  
17 property; and, therefore, became part of the state of  
18 New Mexico and no longer -- no longer had federal --  
19 had characteristics of the federal government or the  
20 pueblos.

21           That pueblo was diminished, and that is the  
22 consequence of the Pueblo Lands Act.

23           And I think --

24           THE COURT: Point me to where there was  
25 explicit relinquishment that -- as it applies in this

1 case versus quiet title.

2 MR. ELSENHEIMER: Well, the word  
3 relinquishment is used in the Pueblo Lands Act. So  
4 in the Pueblo Lands Act itself it says:

5 "This Act shall have the effect only of a  
6 relinquishment by the United States and the said  
7 Indians."

8 And then in the title, it describes a  
9 relinquishment of that land to the United States and  
10 the tribes.

11 Or it said -- the language they used is  
12 "said Indians." We are talking about the pueblo.

13 So the word relinquishment is in the Pueblo  
14 Lands Act.

15 McGirt, the recent Supreme Court case, said  
16 there's no magic language that Congress has to use to  
17 extinguish federal jurisdiction. They have to use  
18 some language that -- if this is an intent to  
19 diminish the tribe.

20 The word relinquish -- I'm sure there are  
21 other synonyms that could have been used. But it's  
22 quite clear that relinquishing something is  
23 disestablishing it. It is diminishing it.

24 So it's relinquishing vis-a-vis the federal  
25 government of the United States and the pueblos, that



1 can only mean one thing. That can only mean the  
2 disestablishment or the diminishment of that  
3 particular pueblo, and that is what happened here.

4 That leads us to the 2005 -- I think a  
5 clear indication that that's what happened in 1924,  
6 is the fact that Congress tried to do something in  
7 2005.

8 The problem with Congress' attempt to do  
9 something in 2005 is that it doesn't have  
10 constitutional authority to do that. Congress  
11 cannot, after it has ceded certain land, or  
12 relinquished federal jurisdiction over certain land,  
13 cannot go back and just, as if on a blank slate,  
14 reassert federal jurisdiction over that land. It has  
15 to have some type of constitutional hub.

16 And in this case we don't have a  
17 constitutional hub. It's not constitutional under  
18 the Indian commerce clause, because it doesn't  
19 pertain at all to commerce with the tribes or the  
20 reservations.

21 It is -- there's no other constitutional  
22 hook on which Congress, in 2005, can go back and  
23 reassert jurisdiction over something that it has  
24 relinquished jurisdiction.

25 In the same way that Congress could not

1 come into Albuquerque and assert jurisdiction over --  
2 over Nob Hill or the -- the Northeast Heights. They  
3 just can't come back and say, We're just going to, on  
4 a clean slate, reassert jurisdiction. There has to  
5 be a constitutional hook for that reassertion of  
6 jurisdiction.

7           If they sold off a piece of land -- if  
8 Congress sold off the federal courthouse, for  
9 example, and it became a -- I don't know, whatever --  
10 it became state land, without some -- without some  
11 type of constitutional hook, Congress could just not  
12 come in and draft a law saying we now have  
13 jurisdiction over that land that we had relinquished  
14 jurisdiction over.

15           THE COURT: So your -- your argument on the  
16 2005 amendment really hinges on your reading of the  
17 PLA and the use of the word "relinquishment."

18           MR. ELSENHEIMER: Yes, precisely. Congress  
19 relinquished jurisdiction, relinquished title of  
20 jurisdiction over that particular piece of land. And  
21 it can't -- and it could not come back later without  
22 a constitutional justification and reassert  
23 jurisdiction over that, in the same way they can't --  
24 Congress is constrained to do that anywhere else.  
25 They could not do that in Espanola.

1           And that's the situation we have here.  
2           That is why the federal government doesn't have  
3           jurisdiction.

4           THE COURT: All right. Thank you,  
5           Mr. Elsenheimer.

6           MR. ELSENHEIMER: Sure.

7           THE COURT: Anything further, Ms. Wilson?

8           MS. WILSON: No, Your Honor.

9           Well, briefly, just to address the plenary  
10          power of Con- -- Congress has plenary power over  
11          Indian tribes, which is clear under the Indian  
12          commerce clause, which is broadly construed. The  
13          United States has briefed -- outlined some of that.  
14          And that only needs to require rational basis,  
15          Your Honor.

16          So it's a fundamental tenet of federal  
17          Indian law. Congress can legislate with regard to  
18          Indian tribes and pueblos, so just with regard to  
19          that issue.

20          And the fact that relinquishment in the  
21          2000 -- in the 1924 -- if defendant's argument relies  
22          totally on that, he is ignoring the Tenth Circuit  
23          case in Antonio, where the Court there determined  
24          that the PLA was a means -- a mechanism to deal with  
25          land disputes. And that specifically, the PLA did

1 not terminate federal jurisdiction. So that's --  
2 that's ignoring that Tenth Circuit precedent.

3 And even if there were issues with the 1924  
4 PLA, in 2005 Congress amended that, which they can do  
5 with their powers, and they have done that. They  
6 have made those clarifications of jurisdiction in  
7 Indian Country, pueblo country specifically.

8 So that's it. Thank you, Your Honor.

9 THE COURT: All right. Thank you,  
10 Ms. Wilson.

11 Anything else, Mr. Elsenheimer?

12 MR. ELSENHEIMER: No, Your Honor.

13 THE COURT: Okay. Well, thank you all for  
14 your presentations today. I will take the matter  
15 under advisement, and I hope to get a decision out  
16 fairly promptly.

17 So anything else that we need to take up?

18 MR. ELSENHEIMER: I don't believe so,  
19 Your Honor.

20 MS. WILSON: No. Not from the government,  
21 Your Honor.

22 THE COURT: All right. Well, thank you  
23 all. And have a good day, and stay safe, everybody.

24 MR. ELSENHEIMER: You as well.

25 THE COURT: Thank you.

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(Proceedings concluded at 10:42 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: September 1, 2020

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